

**BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD
OF THE STATE OF CALIFORNIA**

AB-7342

THE SOUTHLAND CORPORATION and MARTIN D. TOM dba 7-Eleven
900 Clement Street, San Francisco, CA 94118,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

File: 20-215220 Reg: 98044554

Administrative Law Judge at the Dept. Hearing: Arnold Greenberg

Appeals Board Hearing: May 24, 2001
San Francisco, CA

ISSUED SEPTEMBER 27, 2001

The Southland Corporation and Martin D. Tom, doing business as 7-Eleven (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 25 days for their clerk, Qui Pham, having sold an alcoholic beverage to Gary Kishida, a minor, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §25658, subdivision (a). Kishida was acting as a police decoy at the time of the transaction.

Appearances on appeal include appellants The Southland Corporation and Martin D. Tom, appearing through their counsel, John A. Hinman, Richard D. Warren, and Beth Aboulafia, and the Department of Alcoholic Beverage Control, appearing through its counsel, Robert Wieworka.

¹The decision of the Department, dated December 31, 1998, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 1, 1988.

Thereafter, the Department instituted an accusation against appellants charging a violation of Business and Professions Code §25658, subdivision (a).

An administrative hearing was held on November 3, 1998, following which the Department issued its decision which determined that the violation had occurred as alleged.

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) There was no compliance with Rule 141(b)(2); and (2) there was no compliance with Rule 141(b)(5). Appellants raise only these affirmative defenses, and do not contest the fact that there was a sale of an alcoholic beverage to a minor.

DISCUSSION

I

Appellants contend that there was no compliance with Rule 141(b)(2), in that the Administrative Law Judge (ALJ) erroneously confined his evaluation of the decoy's appearance to his physical appearance and failed to consider other indicia of appearance. The Department argues that the issue was not raised during the administrative hearing, so should not be considered by the Appeals Board.

The ALJ made the following finding as to the appearance of the decoy (Finding of Fact III-A):

"Gary Kishida (hereinafter 'the minor') is a clean-shaven, five feet and seven inches tall male person, weighing 135 pounds, whose physical appearance is such as to reasonably consider him being under the age of 21 years. Mr. Kishida, at the time of the sale, had close-cropped black hair the top of which had been subject to a red dye. The minor's appearance at the time of hearing was substantially the same as his appearance at the time of the sale by Respondent's clerk on July 24, 1998."

But for the fact that appellants did not raise the issue of the decoy's appearance at the hearing, this case would be similar to a number of earlier cases where the Board has held that the ALJ erred in his determination that the decoy's appearance complied with Rule 141(b)(2), by limiting his assessment to the decoy's physical appearance and ignoring other considerations which might bear on the appearance displayed by the decoy. (See, e.g., Circle K Stores, Inc. (1999) AB-7080; Circle K Stores, Inc. (1999) AB-7108.)

It is true, as the Department reminds the Board, that Rule 141 provides that a violation of subdivision (b)(2) gives rise to a defense. Ordinarily, then, where a party fails to suggest that any of the provisions of the rule have been violated, it would be contrary to settled law to consider that issue on appeal.

Here, however, the Administrative Law Judge addressed the issue, and in doing so applied an erroneous standard. By limiting his assessment of the decoy's appearance to his physical appearance, and ignoring (or at least failing to indicate that he took into account) other considerations which might bear upon the appearance of the decoy, he erred in his application of Rule 141(b)(2). (See, e.g., Circle K Stores, Inc. (1999) AB-7070; Circle K Stores, Inc. (1999) AB-7108.) Given that this incorrect application of the rule was not apparent until the proposed decision was issued, appellants' raising of the issue in their appeal is not untimely.

II

Appellants also contend that there was no compliance with the face to face identification requirement of Rule 141(b)(5). Appellants do not dispute the fact that an identification occurred, but assert that there is no evidence in the record where the seller was facing, or where he was looking, or what he was doing, at the moment the identification occurred.

The decoy testified on direct examination that he returned to the store with the police officer after the sale, went to the counter, pointed to the clerk who was standing behind the counter, and identified him as the person who sold the alcoholic beverage [RT 17-18].

San Francisco police officer Raymond Luk also testified that the decoy identified the seller by pointing to him while he (the clerk) was behind the counter. Luk said he told the clerk he had sold an alcoholic beverage to a minor, and identified the minor for him, adding that the decoy was seated next to him.

The clerk did not testify.

The argument that there is no evidence as to what the clerk may have been doing at the time he was identified is somewhat misleading, and ignores the reasonable inferences which may be drawn from the testimony of the decoy and the police officer.

Although there is some disagreement between the testimony of the decoy and that of the officer as to whether the decoy witnessed the conversation between the officer and the clerk, there is no doubt that the identification took place in a context where the clerk would have had to virtually turn his back on the officer and the decoy so as not to know he was being singled out as the object of their attention.

ORDER

The decision of the Department is reversed and the case is remanded to the Department for reconsideration in light of the comments herein regarding Rule 141(b)(2).²

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

²This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.